No. 997

In the

Supreme Court of the United States

H. M. HAMMONTREE, JR., et al.,

Petitioners,

v.

THE STATE OF TEXAS,

Respondent.

No. ____

Petition for Writ of Certiorari to the Supreme Court of the State of Texas

H. M. HAMMONTREE, JR.

SUBJECT INDEX

	Page
Caption	1
Opinions of the Courts below	
Trial Court	A-1
Court of Civil Appeals	A-8
Supreme Court of Texas	A-55
Grounds of Jurisdiction of this Court	2
Questions Presented for Review	
1. Unconstitutionality of Texas Art. 6036	3
2. No due process in assessing fine on basis not plead	4
3. Equal protection denied to Petitioners on discovery proceedings	4
4. Due process denied in refusing jury right to pass on disputed facts	4
5. Television and press releases deny Petitioners due process	4
Texas Statute whose validity is questioned	5
Statement of the Case	6
Time at which Federal Question was raised	12
Reasons relied upon for the Writ	14
Conclusion and Prayer	18

APPENDIX INDEX

	Page
Opinion of the Trial Court (R. Item II, pp. 617-623)	A-1
Judgment of the Trial Court (R. Item I, p. 213)	A-4
Opinion of the Court of Civil Appeals (Officially reported in 385 S.W. 2d 411-R. Item IV)	A-8
Opinion of the Supreme Court of Texas (Officially reported in 407 S.W. 2d 467-R. Item X)	A-55
Dissenting Opinion of the Supreme Court of Texas (Officially reported in 407 S.W. 2d 479-R. Item XI)	A-80
Judgment of the Supreme Court of Texas (R. Item XII)	A-81
Order of the Supreme Court of Texas overruling Motion for Rehearing (R. Item XV)	A-83

No. .....

In the

Supreme Court of the United States

H. M. HARRINGTON, JR., et al.,

Petitioners,

v.

THE STATE OF TEXAS,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Texas

---

To: The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

H. M. Harrington, Jr., Charles W. Lutes, Reid H. Allgood and J. W. Baton, residents of the State of Texas and citizens of the United States, Petitioners herein, file this their petition praying that a Writ of Certiorari issue to the Supreme

Court of the State of Texas to review the judgment of such state court of last resort. The Respondent is the State of Texas represented by its Attorney General.

OPINIONS OF THE COURTS BELOW

The judgment of the trial court based on an unconstitutional Texas statute assessing penalty fine of $304,800.00 against these Petitioners, is not reported in any official reporter but is shown in the record (R. Item I, p. 213) and a copy appended, page A-4. The trial court opinion is shown in the appendix, page A-1. The intermediate appeal was to the Court of Civil Appeals for the Third Judicial District at Austin, Texas, whose opinion is officially reported in 385 S.W. 2d 411, and a copy of such opinion reversing $292,000.00 of the trial court's judgment because such court found "no evidence" to support it, appears in the appendix, page A-8. The opinion of the Supreme Court of the State of Texas is officially reported in 407 S.W. 2d 467. A copy of such opinion reversing the Court of Civil Appeals' decision and affirming the trial court's judgment is copied in the appendix, page A-55. The Supreme Court's dissenting opinion is shown in appendix at page A-80.

GROUNDS OF JURISDICTION OF THIS COURT

The date of the decree of the Supreme Court of Texas is October 12, 1966, (R. Item X, Appendix, p. A-79) and the date upon which the decree became final was November 16, 1966, the date upon which Petitioners Motion for Rehearing was overruled. (R. Item XV, Appendix, p. 83).

This Honorable Court has jurisdiction to review the decree of the Supreme Court of Texas, which is the highest

court of the State of Texas, under the provisions of Title 28, United States Code Annotated, Section 1257(3), granting jurisdiction if "the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution** of the United States"; and to a cause where a "right, privilege or immunity is specially set up or claimed under the Constitution."

The following cases are believed to sustain the jurisdiction of this Court: *U.S. ex rel. Bryant v. Fay*, 211 F. Supp. 812, certiorari denied 375 U.S. 852, 84 S. Ct. 111, 11 L. Ed. 2d 79; *Perkins v. State of North Carolina*, 234 F. Supp. 333; *Goss v. Bomar*, 337 F. 2d 341; *Redding v. Pate*, 220 F. Supp. 124; *Douglas v. City of Jeannette*, 130 F. 2d 652, affirmed 319 U.S. 157, 63 S. Ct. 877, 87 L. Ed. 1324.

QUESTIONS PRESENTED FOR REVIEW

1. Is Article 6036, Texas Revised Civil Statutes, providing for fines and penalties for violation of a Texas governmental agency's order, of $1,000.00 per day "for each and every day of such violation and for each and every act of such violation" under which the State of Texas sought a fine of $3,667,000.00, and the Texas courts assessed a fine of $304,800.00 *unconstitutional* as being in violation of Amendment XIV, Sec. 1, guaranteeing "due process" by State courts against imposition of fines violating the intent of Amendment VIII of the United States Constitution providing "excessive bail shall not be required, nor excessive fines imposed, or cruel or unusual punishments inflicted"?

2. Whether the fact that the Texas Courts imposed a fine and penalty on a basis entirely different from the pleadings, was in conflict with the "due process" guaranteed to each citizen of the United States by Amendment XIV of the United States Constitution providing that "no State shall make or enforce any law which shall abridge the privileges or immunities of any citizen of the United States; nor shall any State deprive any person of life, liberty or property without due process of law."?

3. Whether the fact that the Texas Courts refused to allow the Petitioners the equal use of discovery procedure (Same as Federal Civil Procedure Rule 33) was in conflict with the "equal protection" guaranteed to each citizen of the United States by Amendment XIV of the United States Constitution, providing that "no State shall make or enforce any law which shall abridge the privilege or immunities of any citizen of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."?

4. Although Amendment VII of the United States Constitution guarantees the right of trial by jury in Federal proceedings, does the denial of such right in a Texas court deny to a person "due process" guaranteed by Amendment XIV of the United States Constitution where in similar cases the State of Texas would permit a jury to pass on all fact issues?

5. Whether or not the mass of television reports and press releases made or permitted by the Attorney General,

representing the Respondent in this case, were so broad and excessive as to deprive these particular Petitioners of a fair and impartial trial guaranteed to them under the "due process" clause of Amendment XIV of the United States Constitution?

TEXAS STATUTE WHOSE VALIDITY IS QUESTIONED

The Article in question in its present form is shown in the Official Acts of the Texas Legislature as House Bill No. 782, Acts 1935, 44th Legis. Chapter 76, page 180. A copy of the statute is appended to the first page of the opinion of both the Supreme Court of Texas and the Court of Civil Appeals, shown in the appendix, and is as follows:

> "In addition to being subject to any forfeiture that may be provided for by law and to any penalty that may be imposed by the Commission for contempt for the violation of its rules, regulations, or orders, any person violating any of the provisions of this Act or of Title 102, Revised Civil Statutes of Texas, 1925, as amended, or violating any rule, regulation, or order of the Commission promulgated thereunder, shall be subject to a penalty of not more than One Thousand Dollars ($1000) for each and every day of such violation, and for each and every act of such violation, to be recovered in any Court of competent jurisdiction in Travis County, or in the county of the residence of the defendant or, if there be more than one defendant, in the county of the residence of any of them, or in the county in which the violation is alleged to have occurred, such suit by direction of the Commission to be instituted and conducted in the name of the State of Texas by the Attorney General or by the county or district attorney where such suit is brought. The recovery or payment of any such penalty shall not authorize the

violation of any provision of this Act, or Title 102, Revised Civil Statutes of Texas, 1925, as amended, or of any rule, regulation or order of the Commission promulgated thereunder.

"Any person aiding or abetting any other person in the violation of this Act, or of Title 102, Revised Civil Statutes of Texas, 1925, as amended, or of any rule, regulation, or order of the Commission promulgated thereunder, shall be subject to the same penalties as are prescribed herein for violation thereof by any such other person."

STATEMENT OF THE CASE

This cause is one of more than a hundred filed by the State of Texas in the 53rd District Court of Travis County, Texas, seeking fines or penalties totaling almost a half billion dollars, brought under a Texas Statute (Article 6036, Texas Revised Civil Statutes) for alleged violations of rules, regulations or orders issued by the Texas oil administrative body, the Railroad Commission of Texas. By this particular case, which is the only one that has actually had a contested trial, the State of Texas sought penalty fines of $1,000.00 per day for 3,650 days, or 3,667 separate claimed violations, for a total fine of $3,667,000.00. The fines actually assessed were $304,800.00.

This case is, therefore, of paramount importance to all of the people of the State of Texas. It will determine whether "due process" and the "equal protection of the laws" and a truly unconstitutional act of the Texas legislature shall be the rule of law hereafter applied in the State of Texas to the almost one hundred cases that remain to be determined. This is a case of paramount importance.

This Texas statute under which the State of Texas sought to impose such fine of $3,667,000.00, without the necessity of showing either *scienter*, intent, or knowledge, is believed to be unconstitutional if our Federal Bill of Rights, as set forth in the Amendments to the United States Constitution, means what it says in guaranteeing each person "equal protection" and "due process" against the assessment of "excessive fines and unusual punishment".

Not only is this Texas Statute unconstitutional, but the method followed by the State of Texas in its assessment of such fine denied to the Petitioners all their fundamental rights to "due process" and "equal protection" guaranteed to each person by Amendment XIV of the United States Constitution.

The Petitioners were not permitted to have a jury pass upon the facts in the case, but the jury heard only the Respondent's evidence, returned its verdict, was excused, and the Court then heard additional evidence covering certain essential elements of the case not presented in the presence of the jury. This is not "due process". These Petitioners were not only thus *denied a trial by jury*; but they *were not advised of the charges made* against them as the judgment pronounced by the Court was on *a basis entirely different from the pleadings* upon which the case was tried, thus again denying "due process". These Petitioners were denied the "equal protection of the laws", in that they *were denied* the right to the use of the *same rules* of procedure as was granted to the Respondent. The case was tried in the face of such massive adverse publicity, press releases, and television coverage as

to deprive a citizen of a fair trial. May a State thus deprive a citizen of all his Federal rights, or does this Honorable Court uphold the guarantees of the United States Constitution?

This is a civil suit for penalties brought by the State of Texas against the four Petitioners and one other not here involved, under the provisions of Article 6036 of the Texas Revised Civil Statutes as amended in 1935 for alleged violations of the Texas oil regulatory administrative body, the Railroad Commission of Texas, claiming violations of either its Statewide Rule No. 37, or its Statewide Rule No. 54, or its special Hawkins Field Rule No. 1, claimed to have been violated by the Petitioners with an alleged deviated oil well in the Hawkins Oil Field of Texas, such violations *alleged in the pleadings* to have occurred "by virtue of *drilling* said crooked oil well No. 1 and by virtue of *producing oil* by means of said crooked well". (Record, Item I, p. 50—copied in full in opinion of Court of Civil Appeals, Appendix, p. A-18).

Upon the trial, the Respondent offered proof of a very new and technical scientific (gyroscopic) method of well bore surveying inside of small steel well casing from which the jury found the well to be deviated; and that finding of fact is not here contested. The Respondent offered *no proof* on the following essential and necessary elements for the judgment entered:

(1) *No proof* whatever was offered before the jury as to the number of "drilling" days for which a penalty fine was assessed;

(2) *No proof* whatever was offered before the jury as to the number of days the well was "producing oil" for which the pleadings sought a penalty fine; and

(3) *No proof* whatever was offered as to "scienter" on the part of the Petitioners sought to be fined.

In the trial court, at the close of the Respondent's proof, the Petitioners moved for judgment based on the total lack of proof on these essential elements; and being overruled (R. Item I, pp. 103, 106, 111) rested; and the jury returned its verdict finding the well deviated and fixing a "drilling" fine at $800.00 per day for 16 days and a fine of $80.00 per day for 3,650 days for "operating" such well. (R. Item I, pp. 142-143).

After the jury was discharged, the trial court then heard evidence as to the "number" of days involved and entered judgment on a new basis—not plead—that the well was "not plugged". (R. Item I, p. 617—Appendix, p. A-3). The trial court judgment (R. Item I, p. 213) is shown in appendix, at page A-4.

As stated above, there was no evidence on the number of drilling days. Before the jury, the Respondent made the following limited offer of an Exhibit (R. Item III, Exhibit 14) which reflected the date the well was completed. The offer of this Exhibit to the jury was for a limited purpose only, as follows: (R. Item II, p. 20).

> "Your Honor, at this time I offer only for the purpose of showing the instrument was filed, but not for the truth of the matters shown in the instrument Plaintiff's Exhibit No. 14, which is a Form 3 on Well No. 1

> of T. P. Coal & Oil Company Lease, the well potential test, dated the 28th of April, 1952."

In the same fashion, the Respondent limited its offer of what is known as Railroad Commission Form 2 (R. Item III, Exhibit 13) which purports to show the time of beginning and the date of completion of the well—not the actual days spent in drilling—and it was offered before the jury under the following limited offer: (R. Item II, p. 19)

> "Your Honor, at this time we offer into evidence Plaintiff's Exhibit 13 which is a—we offer it only for the purpose of showing the information which is on the exhibit and not for the truth of the exhibit—it is Form 2 well record dated April 28, 1952."

The Respondent having failed to make out a case of multiple violations, the Petitioners rested without offering any proof and the jury having found the well deviated, a finding which is not in any way contested, on motions for judgment, the defect in the lack of evidence to support multiple days of violation being pointed out, the trial court permitted Exhibit 13 and Exhibit 14 to be offered *for all purposes* (R. Item II, p. 617—Appendix p. A-1), despite the fact that there is a question as to how many actual days of drilling took place and how many days the well was shut down "waiting on cement" to harden which is not drilling. The court, in addition, allowed evidence as to the limited number of producing days allowed by the State (R. Item II, p. 621).

The trial court in pronouncing judgment, after allowing this evidence, not considered by the jury, had this to say: (Copied from trial court's opinion shown in appendix).

> "Now, how this well was actually produced is not established by anything except that little bit of evidence you had about its being produced on a calendar basis

for some period of time—for four months, or something. (Item II, p. 618)

"I don't know what the Court is entitled to do about taking judicial knowledge, but I am sitting here knowing that they did not produce day after day after day after day for ten years, or 3,650 days. (R. Item II, p. 619).

"Now, with respect to the 3,650 days of 'operation', I believe that were it to be done again, that that could be done a shade more artfully, both by counsel for the State, and certainly by the Court. Since *we* have these findings, although maybe I might like to try it over to see if *we* could do it a little better—*we* have these findings which establishes the amount with respect to all of the defendants. (R. Item II, p. 622)

"This well certainly was unplugged for a period of at least 3,650 days; so on that basis I will enter a judgment for the plaintiffs in accordance with the dollars found with respect to each of the various defendants by the jury." (R. Item II, p. 623).

If this is "due process"—no pleading for a fine for an unplugged well; no proof as to days of either drilling or days of producing oil and the introduction of evidence not submitted to a jury on an unconstitutional statute not even requiring a showing of *scienter*, with a possible fine in this case of $3,667,000.00, then this Court should refuse this application. If the Court thinks otherwise, the matter should be investigated.

The Court of Civil Appeals, in its opinion (R. Item IV, p. 11), analyzed the evidence on days of production by stating:

"This evidence in our opinion established only the possibility that the well produced oil each of the 3,650 days for which penalties were assessed. It is no more than a scintilla."

The Petitioners, therefore, were denied a jury trial, were fined on a violation not complained of in the pleadings, and were assessed a penalty under an unconstitutional statute providing for excessive fines, and fined on a basis not within the pleadings. The question before the Court is, therefore, does this state court treatment violate "due process" and "equal protection" and the privileges and immunities the Bill of Rights of the Constitution of this great country intended to guarantee a fair trial to each citizen?

TIME AT WHICH FEDERAL QUESTION WAS RAISED

This cause was one of more than a hundred similar suits filed by the State of Texas for fines or penalties for alleged violations of a rule or order of the Texas administrative body in charge of oil and gas, the Railroad Commission of Texas, usually referred to as the so-called slant hole cases, which arose during the year 1962, followed by a great deal of publicity and finally the contested trial of this particular case, which has been the only one of such cases contested, and taken up through the Texas courts. The suit is based upon the provisions of Article 6036, Texas Revised Civil Statutes.

Paragraph 5 of Plaintiff's Original Petition (R. Item 1, p. 7) reads as follows:

> "The Plaintiff shows the court that the drilling of said deviated oil well, and the production of oil from the same, by the Defendants, as above alleged, were in disregard and violation of the laws of the State of Texas, and was in disregard and violation of the rules and order of the Railroad Commission of Texas, including the above mentioned rules, regulations and permits."

Plaintiff's First Amended Original Petition upon which the case was tried alleged the violations complained of in Paragraph 4(o) (R. Item 8, p. 50) to be: "By virtue of *drilling* said crooked oil well No. 1, and by virtue of *producing oil* by means of said crooked well * * * the Defendants were guilty of violating * * * the rules of the Railroad Commission of Texas." (This allegation is quoted in full in the opinion of the Court of Civil Appeals, Item IV, p. 9, and shown in the appendix hereto at page A-18).

The rules or orders of the administrative body alleged to have been violated were alleged to be either Statewide Rule 37, which is a spacing rule which nowhere mentions the deviation of wells, or Statewide Rule 54, which specifically defines deviated wells and requires a showing of "intent", or Hawkins Field Rule No. 1, which nowhere mentions the directional drilling of wells. (R. Item I, p. 50). No evidence of intent or *scienter* was offered and the State accordingly gave up its claims under Statewide Rule 54 (Opinion of Court of Civil Appeals, p. 7—Appendix p. A-15). The fine assessed was for violation of Statewide Rule 37, for 3650 days and 16 days. The total fine sought by the Respondent was against the Defendants, jointly and severally (R. Item I, p. 52). No proof was offered in the trial of the case as to *how many days were involved in the drilling* of the well and *how many days the well operated by producing oil.*

The Petitioners first raised their Federal question in Paragraph XIII of their Answer (R. Item I, p. 71) wherein they plead:

> "For further answer if same be necessary, these Defendants would show that Art. 6036 in providing for

> total maximum penalty of $3,667,000.00 is unconstitutional and void as being in contravention of Sec. 1 of Art. 14 of the amendments to the United States Constitution in that it permits and authorizes the deprivation of Defendants' property without due process of law and deprives these Defendants of their access to the courts, and that these Defendants plead in bar to this suit."

This plea was overruled by the trial court by order dated October 21, 1963 (R. Item I, p. 88), paragraph 8 of which order provided:

> "The plea in bar set out in paragraph 13 of the First Amended Original Answer of Defendants Harrington, Allgood and Lutes attacking the constitutionality of Art. 6036 under the United States Constitution is in all things overruled, to which action of the Court defendants duly excepted."

This same question of "due process" was raised in the Court of Civil Appeals as Point 26 and was by that Court overruled (R. Item IV, p. 34). The same point was raised by the Petitioners in their Application for Writ of Error as their 14th Point (R. Item VI, p. 59), and all Federal questions were overruled without even being discussed in the opinion of the Supreme Court of Texas, the same five Federal questions here presented were presented in Petitioners' Motion for Rehearing in the Supreme Court of Texas (R. Item XIII) and were by that Court specifically overruled in its final order (R. Item XV).

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The Supreme Court of the United States has, since early times, been the guardian of the rights of citizens of the United States against unreasonable statutes passed by State

legislatures and against injustices or denial of due process in state courts. Although most State Constitutions provide for certain protections for their State residents, there are very few state courts which are prone to hold that an act of the legislature of their State to be unconstitutional. It is for this reason that the Petitioners feel that this Court in its unprejudiced and unbiased position should examine the Texas statute in question and determine whether it violates the rights guaranteed to these four Texans as citizens of the United States. This Court's ruling is on a matter vital to a great many persons involved in close to one hundred suits that your ruling will determine.

This same statute has once before been reviewed by a Federal three judge court sitting in Austin in 1932, when that court used the hereinafter quoted language in its discussion of the severity and excessiveness of the fine which could be imposed thereunder. It is interesting to note that the quoted language was made by the court before the 1935 change in the statute which deleted the requirement that *scienter* be shown to establish a penalty. It is to be noticed in the opinion of the Texas Supreme Court now under examination that a showing of *scienter* is not required because of the change of the wording by the legislature in the year 1935. (See opinion in Appendix, p. A-76). We, therefore, today, have a much more drastic and excessive statute than the three judge Federal Court had before it in such case of *F. C. Henderson, Inc., v. Railroad Commission of Texas*, 56 F. 2d 218, where that Court held:

> "While we find the statutes valid, we are impressed with plaintiff's contention that the penalties provided

> by the several statutes (Articles 6008 and 6036) of $1,000 a day, each and every day to constitute a separate offense, are on their face so drastic, so excessive and extreme as that they appear plainly to be designed to affright those subject to the act into abject and incontinent submission. It is fundamental that there is no due process in a statute which, though it provides for penalties collectible by suit, makes every day a new offense, and thus piles them so heavily on as to make prohibitive the hazard of court trial. Such provisions in statutes preventing access to the courts to try out disputed questions of right, deprive the citizen of his fundamental right to 'know his rights, and knowing dare maintain them.' They may not be so pressed."

An appeal was begun from this ruling, but in view of the additional statement of this three judge Federal Court that:

> "The case will be kept open, however, for orders at the foot of the decree, and should it be made later to appear that the defenders (The State) are undertaking to enforce the law by claiming penalties in advance of the final determination of its validity, plaintiff may apply to this Court for an injunction of the kind granted in Oklahoma Operating Co. v. Love, supra, to protect it against the consequences of drastic and oppressive efforts of the State to compel a surrender of plaintiff's undoubted right to in good faith and upon reasonable grounds contend in the courts for the correctness of its view that the statutes as applied to it are confiscatory.";

the State of Texas saw fit to use some discretion in its contentions and the appeal to this Court begun was dismissed. 53 S. Ct. 4. This case, therefore, will be the first opportunity of this Court to pass upon whether this particular Texas Statute in its more extreme present form is such as to deny "due process".

Under the holding of the Supreme Court of the State of Texas, no showing of intent, knowledge, or *scienter* is necessary to be shown. (R. Item XII, p. 18—Appendix, p. A-76). The amount sought in this particular case was a fine of $3,667,000.00, jointly and severally, as against these four individuals for a claimed violation nowhere spelled out in the orders of the administrative body of Texas involved. It will be noticed that the penalty fine assessed was for the violation of Statewide Rule 37 which in no place mentions deviation of an oil well. The rule involving the deviation of an oil well is the Texas Statewide Rule 54, but this rule would require a showing of intent, knowledge or *scienter.*

Not only was a fine assessed under this Texas statute believed to be unconstitutional, but it was assessed under a procedure that did not allow these Petitioners "due process" or the "equal protection of the laws". The trial court assessed and the Supreme Court of Texas approved a fine imposed without pleadings to support it, without proof to support it, and without affording these parties a jury trial, in the midst of mass adverse publicity which was sufficient to even displace the adverse publicity afforded the Billy Sol Estes' scandal which arose at the same time and which this Court has heretofore so wisely recognized, and has protected that harassed individual.

Unless this Court sees fit to review the matter, there are still almost a hundred of these same penalty suits yet to be determined in the Texas courts where the only proof to be required under the Texas Supreme Court ruling is a showing of "deviation" of a well and fine could then be imposed

without a showing of participation, without a showing of knowledge or *scienter* of any kind, and the amount which could be assessed and the amounts which are now sought in one case exceed $13 million dollars. Is this excessive? Is this "due process"?

CONCLUSION AND PRAYER

For the benefit not only of these Petitioners, but for the benefit of multiple groups of citizens to be affected, not only in the present pending persecution but in persecutions that could arise in the future, this Court has before it a very vital and material and new issue to be decided and only this Court can afford the protection in this type of case that our forefathers intended each citizen of the United States to have.

WHEREFORE, your Petitioners respectfully pray that a Writ of Certiorari be issued to the Supreme Court of the State of Texas to the end that this cause and the unconstitutional statute involved in the flagrant violation of "due process" and "equal protection" approved by the Supreme Court of the State of Texas may be corrected and justice thus prevail.

Copies of the foregoing Petition for Writ of Certiorari have been furnished to the Honorable Crawford Martin, the new and present Attorney General of the State of Texas, now representing the Respondent.

H. M. HARRINGTON, JR.,
324 Bramlette Building,
Longview, Texas,
Attorney for Petitioners.

APPENDIX